Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE L. ANDREWS; ARTHUR MORRIS JOHNSON;
HERBERT C. PERKINS; AND JAMES E. PHIPPS, SR.,

PETITIONERS,

V.

ROADWAY EXPRESS, INC.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fifth Circuit Court of Appeals affirmed the summary judgment of the District Court for the Western District of Texas, San Antonio Division, that Petitioners' suit to collect the backpay they were awarded as victims of race discrimination in a class-action Consent Decree was time-barred under Texas' writ of execution practice and procedure.

Petitioners present two questions for this Honorable Court's review, to wit:

(1)

Ordinarily, Rule 69(a) of the Federal Rules of Civil Procedure governs the method of enforcing a federal judgment. Under that Rule, process to enforce a judgment for the payment of money shall be by a writ of execution in accordance with the practice and procedure of the state where the judgment was entered. The question in this case is whether the Fifth Circuit Court of Appeals correctly interpreted the phrase in Rule 69(a), *unless otherwise provided,* to mean that the language in the Consent Decree otherwise providing for the enforcement of the backpay award did not override the requirement in the Rule to enforce the backpay award only in accordance with the state's writ of execution practice and procedures. The Fifth Circuit ruled that the language in the Consent Decree retaining jurisdiction to enforce the backpay award was limited to the Court's "power" to enforce the backpay award, but was not related to the "process" to enforce the backpay award.

QUESTIONS PRESENTED FOR REVIEW (Cont'd)

(2)

Even if the Consent Decree did not provide otherwise for the enforcement of the backpay award, could Petitioners enforce the backpay award in accordance with the state's writ of execution practice and procedures in this case in light of the affidavit of the Deputy District Clerk of Harris County, Texas, who stated that it would have been impossible to prepare a writ of execution to enforce the Consent Decree under state law. The Fifth Circuit disagreed with the Deputy District Clerk's conclusion and held that a writ of execution could have been prepared under state law, even though the amounts Petitioners were entitled to receive in backpay are not contained in the Consent Decree or in the Order Approving the Consent Decree.

LIST OF ALL PARTIES

The caption of the case contains the names of all the parties in the court whose judgment is sought to be reviewed.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Andrews vs. Roadway Express, Inc.*, 473 F.3d 565 (5th Cir. 2006). The opinions of the District Court for the Western District of Texas, San Antonio Division, granting Defendant Roadway Express, Inc.'s Motion for Summary Judgment and denying Plaintiffs Andrews, *et al.*'s Motion for New Trial, have not been reported. The District Court's Docket Number is 5:04-CV-606. A copy of all three opinions is included in the Appendix.

STATEMENT OF JURISDICTION

A. DISTRICT COURT:

The District Court has jurisdiction over the parties and the subject matter of this suit pursuant to the provisions of 28 U.S.C. §§ 1331 and 1332 and 42 U.S.C. § 1943. Plaintiffs/Petitioners are citizens of the State of Texas and the Defendant/Appellee is a citizen of the State of Ohio, for diversity jurisdiction purposes, and the amount in controversy, exclusive of interest and attorney's fees, exceeds the sum of $75,000.00

This suit arises from a Consent Decree entered in a Title VII employment discrimination case, brought under the provisions of 42 U. S. C. §§ 1981 and 1983, in regard to federal question jurisdiction.

The District Court has the inherent authority to enforce its judgment and has statutory authority to enforce its judgment, pursuant to 28 U. S. C. § 1651.

B. COURT OF APPEALS

The Court of Appeals has jurisdiction to review the final decision of the District Court for the Western District of Texas, San Antonio Division, pursuant to the provisions of 28 U. S. C. § 1291.

C. SUPREME COURT

This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. § 1254 (1).

The Fifth Circuit Court of Appeals Opinion was rendered on December 19, 2006. No motion for new trial and no suggestion for rehearing *en banc* was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

A. FEDERAL RULE OF CIVIL PROCEDURE:

Rule 69. Execution

> **(a) In General.** Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of

execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

B. TEXAS CIVIL PRACTICES & REMEDIES CODE:

Sec. 34.001. No Execution on Dormant Judgment

(a) If a writ of execution is not issued within ten years after the rendition of the judgment of a court of record or a justice court, the judgment is dormant and execution may not be issued on the judgment unless it is revived.

Sec. 31.006. Revival of Judgment

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the

judgment becomes dormant.

C. TEXAS RULES OF CIVIL PROCEDURE:

Rule 622. Execution

An execution is a process of the court from which it is issued. The clerk of the district or county court, or the justice of the peace, as the case may be, shall tax the costs in every case in which a final judgment has been rendered, and shall issue execution to enforce such judgment and collect such costs. The execution and subsequent executions shall not be addressed to a particular county, but shall be addressed to any sheriff or any constable within the State of Texas.

Rule 629. Requisites of Execution

The style of the execution shall be "The State of Texas". It shall be directed to any sheriff or constable within the state of Texas. It shall be signed by the clerk or justice officially, and bear the seal of the court, if issued out of the district or county court, and

shall require the officer to execute it, according to its terms, and to make the costs which have been adjudged against the defendant in execution and the further costs of executing the writ. It shall describe the judgment, stating the court in which, and the time when, rendered, and the names of the parties in whose favor and against whom the judgment was rendered.

Rule 630. Execution on Judgment for Money

When an execution is issued upon a judgment for a sum of money, or directing the payment simply of a sum of money, it must specify in the body thereof the sum recovered or directed to be paid and the sum actually due when it is issued, and the rate of interest upon the sum due. It must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution.

STATEMENT OF THE CASE

Petitioners Eddie L. Andrews, Arthur Morris Johnson,

Herbert C. Perkins, and James E. Phipps, Sr. brought this action to recover the backpay and interest awarded to them in the Consent Decree the Federal District Court for the Western District of Texas, San Antonio Division, entered in the case styled, "Salinas, *et al.* vs. Roadway Express, Inc., *et al.*", Civil Action No. SA-71-CA-254. See, also, the two previous appeals of the *Salinas* case, *Salinas vs. Roadway Express, Inc.*, 802 F.2d 787 (5th Cir. 1986), *cert. denied,* 479 U. S. 1103, 107 S.Ct. 1335, 94 L.Ed.2d 185 (1987); and *Salinas vs. Roadway Express, Inc.,* 735 F.2d 1574 (5th Cir. 1984).

Starting at the beginning of this protracted effort to recover damages against Roadway, Inc., Thomas Salinas and others filed an employment discrimination suit in the San Antonio Division of the Western District of Texas on September 17, 1971, in a case styled, "Salinas, *et al.* vs. Roadway Express, Inc., *et al.*", in Civil Action No. SA-71-CA-254. The suit alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and of a portion of Section 2 of the Civil Rights Act of 1866, now codified as 42 U.S.C. § 1981.

In particular, the suit alleged that Roadway Express, Inc. and the Teamsters Union discriminated against Blacks and Mexican Americans by maintaining separate or dual seniority systems in the collective bargaining agreements for city and over the road drivers and that Roadway Express, Inc. refused to hire or assign over the road positions to Black or Mexican American drivers, as opposed to city assignments, because of their race and/or national origin.

Three years later, on November 6, 1974, the Judicial Panel on Multi-District Litigation ordered that the action be consolidated with other similar pending actions against

Roadway and the Teamsters for pre-trial proceedings, pursuant to 28 U.S.C. § 1407. Following a hearing on May 1, 1975, the Court, on June 2, 1975, entered an Order certifying the case as a class action under F.R.Civ.P. 23, dismissing the consolidated actions and permitting the named plaintiffs in the dismissed actions, including Petitioner Eddie Andrews, to intervene in the class action.

After more than five and one-half years of extensive discovery, the Court conducted the trial of the case, intermittently, from April 18, 1977, to April 18, 1978. Almost three years after the final day of trial, on March 23, 1981, the Court entered findings of facts and conclusions of law and the judgment of the Court. However, after hearing motions to alter and/or amend the judgment, the Court, on November 19, 1981, entered amended findings of fact and conclusions of law, and entered judgment that plaintiffs class take nothing against Roadway as to their charges of racial and/or national origin discrimination, but that Roadway pay over $206,000.00 in attorney's fees and costs to plaintiffs' class counsel, Messrs. Stuart Nelkin and Warren Weir.

After Messrs. Nelkin and Weir refused to appeal the take nothing judgment without payment of a substantial retainer, certain members of the class employed Carnegie H. Mims, Jr. to appeal that judgment to the Fifth Circuit Court of Appeals. In a decision dated July 16, 1984, three years after judgment had been entered by the District Court, the Fifth Circuit Court of Appeals vacated the judgment of the court and remanded the case for a new trial. *See, Salinas vs. Roadway Express, Inc.,* 735 F.2d 1574 (5th Cir. 1984). None of the parties appealed the Fifth Circuit decision.

Before the case was called to trial after the remand

from the Fifth Circuit, the parties met and reconciled their differences. On November 16, 1984, the parties announced in open court that they had reached an agreement and almost five months later, April 12, 1985, the Consent Decree was formally signed.

Under the Consent Decree, the class was defined in the following manner:

> Plaintiffs' class consists of the named plaintiffs as hereinafter defined and other Blacks, Mexican-Americans and Spanish Surnamed Americans (and/or their heirs, estates or duly designated guardians), who were city drivers for Roadway at any time between November 21, 1968, and June 2, 1975, at locations within the territory covered by the Southern Conference of Teamsters Supplemental Agreement to the National Master Freight Agreement, excluding the City of Atlanta, Georgia.

Petitioner Eddie L. Andrews was a named plaintiff in the lawsuit and Petitioners Arthur Morris Johnson, Herbert C. Perkins, and James E. Phipps, Sr. met the definition of the class because they were city drivers for Roadway between November 21, 1968, and June 2, 1975.

On November 4, 1985, United States District Judge Manuel Real of Los Angeles, California, signed an "Order Approving Proposed Consent Decree and Final Judgment". That Final Judgment was entered in the record of this cause on November 12, 1985.

Forty-two members of the class, out of approximately 200 members, including Petitioner Eddie L. Andrews, employed Mr. Larry Q. Evans to appeal the Consent Decree to the Fifth Circuit Court of Appeals. While the forty-two members of the class lost that appeal, they did not lose their right to receive their monetary award or over the road assignments under the Consent Decree. *See, Salinas vs. Roadway Express, Inc.*, 802 F.2d 787 (5th Cir. 1986), *cert. denied,* 479 U.S. 1103, 107 S.Ct. 1335, 94 L.Ed.2d 185 (1987).

In its motion for summary judgment, Respondent Roadway Express, Inc. did not deny any of those facts. Moreover, in their response to Respondent's Motion for Summary Judgment, Petitioners attached copies of the original documents from Respondent's file to demonstrate that there was no genuine issue of a material fact concerning Petitioners' claims under the Consent Decree and that Respondent intentionally or unintentionally misrepresented that it had paid the claims of two of the Petitioners, Arthur Morris Johnson and James E. Phipps, Sr, in the early 1990's.

Also, Petitioners attached to their response to Respondent's Motion for Summary Judgment, correspondence between them and Roadway, beginning in 1991, requesting their backpay, and correspondence with class counsel, Mr. Stuart Nelkin, requesting his assistance in recovering their backpay. Mr. Nelkin declined to assist the Petitioners.

ARGUMENT AND AUTHORITIES

Summary judgment would have been appropriate for Petitioners, but not for Respondent. There is no material

issue of fact concerning Petitioners' right to recover the backpay and interest they were awarded in the Consent Decree. However, because the Court of Appeals disagreed with the conclusion reached by the Harris County Deputy Clerk, that a writ of execution could not be processed from the Consent Decree or the Order Approving the Proposed Consent Decree and Final Judgment, the Court of Appeals created a fact issue in regard to the impossibility of enforcing the Consent Decree in accordance with state practice and procedure.

Before that fact issue surfaced, the only defense to Petitioners' claim was Respondent's argument that under Texas' law, made applicable to federal judgments by virtue of F.R.Civ.P. 69(a), a judgment becomes dormant if a writ of execution is not issued within ten years of the date of the judgment, and it becomes void two years later if a suit is not filed within that period to revive the judgment, according to Tex. Civ. Prac. & Rem. Code §§ 34.001 and 31.006, respectively.

Petitioners disagree that Texas' law applies, and argue in the alternative, that if it does, it would have been impossible to comply with the Texas' law.

RULE 69(a) IS INAPPLICABLE

According to the Court of Appeals, F.R.Civ.P. 69(a) applies, and because Petitioners failed to follow Texas' practice and procedure as found in the provisions of Tex.Civ.Prac.& Rem.Code §§ 34.001 and 31.006, the

Consent Decree became dormant when no writ of execution was issued within ten years of the date of the judgment, and the Consent Decree became void when no suit was filed within two years after the Consent Decree became dormant. [Query, what if another class member did have a writ of execution issued, is the Consent Decree void as to the other class members who did not request the issuance of a writ of execution?].

Petitioners do not believe that F.R.Civ.P. 69(a) applies because of the plain language of the statute. It reads:

> **Rule 69. Execution**
>
> **(a) In General.** Process to enforce a judgment for the payment of money shall be a writ of execution, ***unless the court directs otherwise*** [our emphasis]. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. . . .

Petitioners do not argue that the federal statute exception in Rule 69(a) is applicable, other than the general statute giving federal courts the authority to enforce their judgments, 28 U.S.C. § 1651(a); instead, they argue that the "unless the court directs otherwise" clause is applicable in this case.

In class-action suits, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise, even in the form of a negotiable instrument to pay the relief to which it has decided class members are entitled. *See, In re Corrugated Container Antitrust Litigation,* 752 F.2d 137 (5th Cir. 1985), *cert. denied,* 473 U.S. 911, 105 S.Ct. 3536, 87 L.Ed.2d 660 (1985).

In many consent decrees, the district court retains jurisdiction to enforce the settlement agreement. Continuing enforcement of a consent decree is rightfully considered an extension of the original lawsuit. *See, Beeks vs. Hundley,* 34 F.2d 658 (8th Cir. 1994); and *Halderman by Halderman vs. Pennhurst State School and Hospital,* 901 F.2d 311 (3rd Cir. 1990), *cert. denied,* 498 U. S. 850, 111 S.Ct. 140, 112 L.Ed.2d 107 (1991).

The District Court retained jurisdiction in this case to enforce the Consent Decree. Section IX, on page 33, and Section VI, on pages 19 and 20, of the Consent Decree, attached to Respondent's Motion for Summary Judgment under Tab 2, state, respectively:

SECTION IX. CONTINUING LIMITED JURISDICTION

There being no just reason for delay, the entry of this Decree finally adjudicates all of the claims, rights and liabilities of all the

parties and members of the plaintiffs' class and terminates this action with prejudice except the Court shall retain jurisdiction of this matter for the sole, express and limited purposes of: (1) enforcing and/or interpreting the terms of this Decree as previously set forth in Section VI hereof ; (2) determining the eligibility of members of plaintiffs' class; (3) enforcing the provisions relating to reassignment to road driver positions and retreat provisions as set forth in Section V; (4) determining identities of members of plaintiffs' class as set forth in Section XI hereof; (5) resolving any and all disputes pertaining to the identities and/or interests, partnerships, corporations, creditors, heirs, administrators, executors or persons who may be, or claim to be, entitled to all or a portion of or interest in any settlement payments.

SECTION VI.BACK-PAY SETTLEMENTS

A. Payment of Back-Pay Settlements - The back-pay settlements amounts as detailed in Appendix 10 shall be paid in the manner described herein upon the Court's final approval of this Decree and upon the expiration of the period for appeal described in Rule 4, Fed.R.App.Proc., or a final determination upon appeal affirming the entry of this Decree, whichever occurs later; provided, however, distribution of said back-pay settlement amounts in accordance with Section VI C of this Decree shall be expressly

> conditioned upon prior execution and delivery to Roadway both the Release and Agreement and Confidentiality Agreement, attached hereto as Appendices 11 and 12, respectively. In lieu of any rate of interest, statutory or otherwise, which might accrue on any amounts to be paid pursuant to this Decree, interest, at a rate of 10.5 percent per annum, will begin to accrue only on the back-pay settlement amounts upon the filing of a notice of appeal and will accrue at such rate until said appeal is dismissed or a decision upholding this Decree is issued by the Court of final review considering said appeal.
>
> . . .

According to the above-quoted language, the District Court retained jurisdiction to enforce the backpay and other provisions of the Consent Decree.

The Court of Appeals held that Petitioners confuse the district court's retention of continuing jurisdiction to enforce its judgment with the procedures by which the district court will enforce it and that Rule 69(a)'s "otherwise" clause is to be construed narrowly, citing *Aetna Cas. & Sur. Co. vs. Markarian,* 114 F.3d 346, 349 (1st Cir. 1997); *Combs vs. Ryan's Coal Co.*, 785 F.2d 970 (11th Cir. 1986); and *Shuffler vs. Heritage Bank*, 720 F.2d 1141 (9th Cir. 1983).

None of the cases the Court cited apply to this case. None of the cases were class suits and the judgments in those cases did not contain language similar to the language in our Consent Decree. And, moreover, in all the cases cited, the judgment creditors attempted to enforce the judgment by civil contempt, or by civil fine, or by *ne exeat*, a form of civil

arrest, after the judgment had been entered.

Here, the Distric Court retained jurisdiction to enforce the backpay and other provisions of the Consent Decree *before* enforcement was contemplated. That is, the District Court did not "direct" a remedy for executing the judgment *after* the entry of the judgment as the case was in *Aetna, Combs,* and *Shuffler, supra.* The preferable way to enforce a consent decree is by filing a separate suit according to *Halderman by Halderman vs. Pennhurst State School and Hospital*, 901 F.2d 311 (3rd Cir. 1990), *cert. denied*, 498 U.S.850, 111 S.Ct. 140, 112 L.Ed.2d 107 (1991).

Since the District Court in this case "directed otherwise" in the body of the judgment, as authorized by F.R.Civ.P. 69(a) and 28 U.S.C. § 1651(a), process to enforce a judgment for the payment of money need not be by writ of execution and, therefore, the state's procedural provisions, Tex.Civ.Prac. & Rem. Code §§ 34.001 and 31.006, do not apply.

IMPOSSIBILITY OF FILING WRIT OF EXECUTION

Petitioners do not believe that under Texas' law, a writ of execution could have been issued on either the Consent Decree or on the November 12, 1985, Final Judgment.

Rule 622 of the *Texas Rules of Civil Procedure* defines "execution". It reads:

Rule 622. Execution

An execution is a process of the court

from which it is issued. The clerk of the district or county court, or the justice of the peace, as the case may be, shall tax the costs in every case in which a final judgment has been rendered, and shall issue execution to enforce such judgment and collect such costs. The execution and subsequent executions shall not be addressed to a particular county, but shall be addressed to any sheriff or any constable within the State of Texas.

The requisites of an execution are stated in Rule 629; it states:

Rule 629. Requisites of Execution

The style of the execution shall be "The State of Texas." It shall be directed to any sheriff or any constable within the state of Texas. It shall be signed by the clerk or justice officially, and bear the seal of the court, if issued out of the district or county court, and shall require the officer to execute it, according to its terms, and to make the costs which have been adjudged against the defendant in execution and the further costs of executing the writ. It shall describe the judgment, stating the court in which, and the time when, rendered, **and the names of the parties in whose favor and against whom the judgment was rendered**. . . [our emphasis].

The November 12, 1985, Order Approving the Proposed Consent Decree and Final Judgment, attached to

Respondent's Motion for Summary Judgment under Tab 4 does not include "the names of the parties in whose favor and against whom the judgment was rendered", as required by Rule 629.

Rule 630 requires the writ to include the amount of money awarded in the judgment. It reads:

> **Rule 630. Execution on Judgment for Money**
>
> When an execution is issued upon a judgment for a sum of money, or directing the payment simply of a sum of money, it must specify in the body thereof the sum recovered or directed to be paid and the sum actually due when it is issued, and the rate of interest upon the sum due. It must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution.

Again, the November 12th Final Judgment does not state the amount of money Roadway agreed to pay Petitioners. Indeed, under the Final Judgment and the Consent Decree, the members of the class had to promise to keep the amounts they received under the Consent Decree confidential and not disclose the amount to anyone. That section reads:

> SECTION VII. CONFIDENTIALITY PROVISIONS
>
> The individually named Plaintiffs; all members of the Plaintiffs' class who

> participate herein; counsel of record for all parties herein; all directors, officers, and employees of Roadway; representatives of the Southern Conference of Teamsters; representatives of Teamster Local 657; representatives of Teamster Local 988; and all persons in active concert or participation with them who receive actual notice of this Decree by personal service or otherwise are hereby permanently enjoined from disclosing the amounts of and basis for the backpay settlement payment amounts and/or attorney's fees; costs and expenses which are the subject of this Decree, or the total thereof, . . . [Court's emphasis].

The Court of Appeals held that despite the Final Judgment not naming the parties and the amount recovered, Petitioners should have tried anyway - "Inability to comply with one aspect of Texas law does not excuse them from the law in its entirety. *See Collins v. Hines,* 99 S.W.400 (Tex.1907) (holding that failure to comply absolutely with the requirements does not necessarily destroy the validity of a writ of execution); *Teston v. Brannin*, 261 S.W. 788 (Tex.Civ.App. - El Paso 1924) (holding that substantial compliance with the requirements of a writ of execution is sufficient)." [Court's Opinion, p. 6].

Collins and Teston, supra., dealt with irregularities, not impossibilities. In *Collins, surpa.,* the Texas Supreme Court said that the writs furnished by justices of the peace will be granted unusual indulgence (*Collins, id,* pp. 401-402) even though the writ correctly described the judgment; it just didn't describe it in the right place. *Teston, supra.,* did not

involve a writ of execution; it involved an order of sale stemming from a judicial foreclosure and the order omitted the Supreme Court Appeal Number, which was not required.

In this case, we are not dealing with irregularities; we are dealing with impossibility.

The Court of Appeals failed to state in what aspect could Petitioners comply with the execution provisions.

In that connection, the Court of Appeals said: "Moreover, appellants misread the requirements for a writ of execution under Texas law. According to the plain language of the Texas Rules of Civil Procedure, the *execution* [Court's emphasis] itself - not the underlying judgment - must contain the names of the parties and the sum to be paid. *See* TEX.R.CIV.P. §§ [sic] 629, 630. Appellants simply had to include the requisite names and amounts in their writ to enforce the judgment, which they did in their present suit". [Court's Opinion, pp. 6-7].

The Court is sadly mistaken. The judgment creditor does not prepare the writ; the clerk of the court performs that perfunctory task and the clerk has only the judgment from which to prepare the writ of execution. The clerk cannot take the word of the judgment creditor; the information must be contained in the judgment, something the Court of Appeals was not aware of. *See,* Tex.R.Civ.Pro. 622 and 629; *Lee Way Motor Freight, Inc. vs. Welch,* 764 P.2d 191 (Okla. 1988).

Ms. Darla Turner, Supervisor of the Post Judgment Department of the Harris County District Clerk's Office, reviewed the November 12th Final Judgment. Her office

prepares and issues writs of executions for the district courts in Harris County, Texas. She stated under oath in the affidavit attached to Plaintiffs' Motion for New Trial that to her knowledge, her office had never issued a writ of execution on a Consent Decree out of a federal court and that her office would not have been able to prepare and issue a writ of execution on the November 12, 1985 Final Judgment because it does not state in the body thereof the names of the parties in whose favor and against whom the judgment was rendered, or the amount of the judgment rendered.

According to state law, the execution must state correctly the name of the judgment debtor and the amount of the judgment and costs as described in the judgment sought to be enforced. *See, Long vs. Castaneda*, 495 S.W.2d 591 (Tex.Civ.App. - San Antonio 1971, writ ref'd n.r.e.); *Houston Oil Co. of Texas vs. Rudolph*, 251 S.W. 794 (Tex.Comm'n App. 1923); *Barnes vs. Nix,* 56 S.W. 202 (Tex.Civ.App. 1900); and *Lee Way Motor Freight, Inc. vs. Welch,* 764 P.2d 191 (Okla. 1988).

As the Amarillo Court of Appeals stated, as a rule of statutory construction, it is presumed that the Legislature does not require the performance of an useless act. *Hicks vs. First National Bank in Dalhart,* 778 S.W.2d 98, 103 (Tex.App. - Amarillo 1989, writ dism'd). *See,* also, *Hunter vs. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981). It would, certainly, be a useless act to apply for a writ of execution then, or now, on the November 12, 1985, Final Judgment.

In response, the Court of Appeals held in footnote 5 of its opinion that the writ is issued by the federal court who then applies Texas law, none of which depends on the abilities

of state court administrative offices.

Again, the Court is mistaken. According to Rule 69(a), "the procedure on execution . . . shall be in accordance with the practice and procedure of the state...". If the practice and procedure of Texas would not permit the issuance of the writ, then compliance would be impossible. It has nothing to do with the abilities of state court administrative offices; it has everything to do with the absence of pertinent information in the judgment from which a valid writ of execution could be issued by the clerk of the court.

Finally, the Court makes another gross error. The Court stated that: "The amounts to be paid are specified as 'the sums set forth' in Exhibit 'I'. As with the list of plaintiffs, Exhibit I was incorporated into the judgment and is sufficient under Texas law to satisfy a writ of execution." [Court's Opinion, p. 8].

Roadway Express was so paranoid about the settlement becoming public knowledge, that it not only insisted on the Confidentiality provision in the Consent Decree, and on each class member signing a separate Confidentiality Agreement, it, also, refused to include and attach Exhibit "I" or Appendix 10 to the Consent Decree or to the Order Approving the Proposed Consent Decree and Final Judgment. That is why Petitioners were forced to bring this suit, because nowhere in the Consent Decree or in the Order Approving the Proposed Consent Decree and Final Judgment is their award published.

CONCLUSION

In regard to Rule 10 of the Supreme Court Rules,

Petitioners believe that this is a case the Supreme Court should review because the Court of Appeals has decided an important federal question that should be, but has not been, settled by this Court.

The Consent Decree and the Order Approving the Proposed Consent Decree and Final Judgment are not subject to Texas' writ of execution provisions because the District Court retained jurisdiction, before any enforcement procedure could be commenced, to enforce the backpay and other provisions of the Consent Decree. Moreover, a valid writ of execution could not be issued under state law because the judgment debtors and creditors are not identified and the judgment amount is not included in either the Consent Decree or in the Order Approving the Proposed Consent Decree and Final Judgment, and the judgment creditors cannot, unilaterally, fill-in the blanks, despite the Court of Appeals holding.

In the scheme of things, this is a small case compared to the other cases the Court regularly reviews. Nevertheless, this case is mighty important to the four Petitioners who have struggled for over thirty-five years to collect the damages they are entitled to receive, but have been unable to obtain through no fault of their own. We hope the Court will take into consideration their individual efforts to collect their damages through self-help and through their class counsel, who, at the last moment, turned his back on their requests for help.

PRAYER

WHEREFORE, PREMISES CONSIDERED,

Petitioners respectfully pray that this Petition for a Writ of Certiorari will be considered, that this Honorable Court will decide to review this case and for such other and further relief the Court deems just and proper under the circumstances.

Respectfully submitted,

MIMS & ASSOCIATES

By: Carnegie H. Mims, Jr.

Carnegie H. Mims, Jr.
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State Bar No. 14175000
Attorneys for Petitioners Eddie L. Andrews, Arthur Morris Johnson, Herbert C. Perkins, and James E. Phipps, Sr.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari has been mailed to Mr. Drew B. Tipton, of Baker & Hostetler, LLP, at 1000 Louisiana Street, Suite 2000, Houston, Texas 77002-5009, by regular mail, postage prepaid, on this the 17th day of March, 2007.

Carnegie H. Mims, Jr.

APPENDIX
(COURT OF APPEALS OPINION)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-51772

EDDIE L. ANDREWS; ARTHUR MORRIS JOHNSON; HERBERT C. PERKINS; JAMES E. PHIPPS, SR.,

Plaintiffs - Appellants,

versus

ROADWAY EXPRESS, INC,

Defendant - Appellee.

Appeal from the United States District Court
For the Western District of Texas

Before JONES, Chief Judge, and DAVIS and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

In 1985, Roadway Express ("Roadway") settled a class action discrimination lawsuit with its Black and Hispanic employees. The district court issued an Order approving the Consent Decree, and this Court affirmed. Four members of the class now bring suit in federal court to enforce the Order

and to recover back-pay and interest under its terms. The magistrate judge determined that, under Texas law, appellants are time-barred from enforcing the Consent Decree. We affirm.

I

In 1971, Black and Hispanic truck drivers in San Antonio, Texas, filed an employment discrimination suit against Roadway under Title VII and 42 U.S.C. § 1981, alleging that the company maintained dual seniority systems and made hiring and assignment decisions based on race and national origin. The case was certified as a class action in the district court. After a long history of extensive discovery, various orders, and appeals, the case eventually settled. As Rule 23(e)(1) requires court approval of class action settlements, the district court entered an "Order Approving Proposed Consent Decree and Final Judgment" in 1985. Forty-two members of the 200-person class, including one of the appellants in this case, appealed the Order and lost. *See Salinas v. Roadway Express, Inc.*, 802 F.2d 787 (5th Cir. 1986), *cert. denied,* 479 U.S. 1103 (1987).

Seventeen years after the Supreme Court denied review of the Order, Eddie Andrews, Arthur Johnson, Herbert Perkins, and James Phipps ("appellants") filed the present suit in district court. They seek to recover back-pay benefits and interest under the Consent Decree, in the respective amounts of $50,000, $6,000.00, $2,700, and $40,000. A magistrate judge granted summary judgment in favor of Roadway, holding that the 1985 Order was dormant under Texas law, see TEX.CIV.PRAC&REM.CODE ANN. § 34.001 (providing that a writ of execution must issue within ten years of the date of judgment), and that, as a result, he

was without power to issue a writ of execution.[1] Further, the court held that the statute of limitation on suits to revive dormant judgments had passed. *Id* § 34.006 (providing that execution may not be issued unless the judgment is revived by an action brought within two years following the date on which the judgment became dormant). Plaintiffs now appeal summary judgment.

II

The Court reviews an order granting summary judgment *de novo*. *Wyatt v. Hunt Plywood Co.*, Inc., 297 F.3d 405,408 (5th Cir.2002). Summary judgment should be granted only when there is "no genuine issue as to any material fact.". FED.R.CIV.P. 56(c); *Wyatt,* 297 F.3d at 408-09.

A

Appellants first contend that Texas law governing the execution of judgments is inapplicable to the 1985 Order. They argue alternatively that even if Texas law does apply, it would have been impossible for them to comply with its requirements. We find neither of these arguments to have merit.

To enforce a judgment, judgment creditors must file a writ of execution in accordance with the "practice and procedure of the state in which the district court is held."

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[1]Both parties agreed to trial by magistrate.

FED.R.CIV.P. 69(a).[2] Time limits for writs of execution are procedural in nature and are governed by state law. *See Home Port Rentals, Inc. v. Int'l Yachting Group, Inc.*, 252 F.3d 399, 406-09 (5th Cir. 2001) (applying Louisiana's 10-year limitation for enforcement of judgment in a securities fraud case); *Kellum*, 523 F.2d at 1284 (applying Mississippi statute of limitation to U.S. enforcement of consent decree

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[2]We have always held that a consent decree approved by a judicial order is a "judgment" for the purposes of Rule 69(a). *See Kellum*, 523 F.2d at 1287 (applying Rule 69(a)'s writ of execution to enforce a consent decree because the "consent judgment for the recovery of money owed the United States, the amount of which is not is dispute, embraced all of the attributes commonly accorded a judgment, as much so as if it had been the result of litigation."); *see also United States v. City of Miami, Fla.*, 664 F.2d 435,439 (5th Cir. 1981)("A consent judgment has the same force and effect as any other judgment . . . .")(internal quotations omitted); *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 349 (5th Cir. 1998)(A consent decree "functions as an enforceable judicial order.").

against individuals on unpaid debt).[3]

Appellants contend that state law does not apply to them because the 1985 Order "directed otherwise." FED.R.CIV.P. 69(a) ("Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.") In support of their argument, appellants point to language in the Order whereby the district court expressly retained jurisdiction to enforce the parties' settlement agreement:

> the Court shall retain jurisdiction of this matter for the sole, express and limited purposes of: (1) enforcing and/or interpreting the terms of this Decree as previously set forth in Section VI hereof . . . .

Appellants do not cite, and we have not found, any authority supporting their assertion that the district court's retention of continuing jurisdiction to enforce its judgment is

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[3]Although appellants and this Court have referred to time-limits for bringing a writ of execution as "statutes of limitation," the Supreme Court has held that time limits for enforcement of judgments are procedural in nature and not traditional statues of limitation. *Custer v. McCutcheon,* 283 U.S. 514, 519 (1931) ("The time limited for issuing executions is, strictly speaking, not a statute of limitation. On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in the course of a litigation after it is instituted."); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3013 (2d ed. 1987).

tantamount to electing a process of enforcement other than execution according to state law. Instead, appellants confuse the district court's jurisdiction to enforce the judgment --- which no party disputes --- with the procedures by which the district court will enforce it. Moreover, we hesitate to interpret the Order's language so broadly as to override Rule 69(a)'s standard writ of enforcement procedures, especially since Rule 69(a)'s "otherwise" clause is to be construed narrowly. *See Aetna Cas. & Sur. Co. v. Markarian,* 114 F.3d 346,349 (1st Cir. 1997); *Combs*, 785 F.2d at 980; *Shuffler v. Heritage Bank,* 720 F.2d 1141, 1148 (9th Cir.1983) ("[W]e do not interpret the exception to execution to permit a federal court to 'enforce a money judgment by . . . methods other than a writ of execution, except in cases where established principles so warrant.'") (*quoting* 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 69.03[2] (2d ed. 1982). Accordingly, the district court's mere retention of continuing limited jurisdiction to enforce a final judgment does not trigger the "otherwise" clause of Rule 69(a).

Accordingly, we apply Texas's procedures for writs of enforcement to the instant action.

B

Applying Texas's time-limits, we agree with the magistrate judge that appellants' enforcement action was filed too late. A judgment is "dormant" if no writ of execution is issued within ten years after the date of the judgment. TEX.CIV.PRAC.&REM.CODE ANN § 34.001. Thereafter, execution may not be issued unless the dormant judgment is "revived" by an action brought within two years after the date on which the judgment became dormant. *Id.* § 34.006.

Execution of a dormant judgment that is not timely revived is barred forever. *See Williams v. Short,* 730 S.W.2d 98, 100 (Tex. App.-Houston 1987) (holding judgment to be barred forever if not properly revived under § 34.006) (*citing Arroyo Colo. Navigation Dist. of Cameron v. Young,* 285 S.W.2d 308,309 (Tex. Civ. App.-Austin 1956). Under Texas law, appellants did not attempt to collect from the defendant until seventeen years after the judgment became final on appeal.[4] Therefore, they can no longer bring a writ of execution.

Appellants argue that it would have been futile for them to attempt to comply with Texas procedure because the Order was not sufficiently definite to support the issuance of a writ of execution. In support of this contention, they cite Texas Rules of Civil Procedure which require that an execution describe "the names of the parties in whose favor and against whom the judgment was rendered" and "specify in the body thereof the sum recovered or directed to be paid and the sum actually due when it is issued." TEX.R.CIV.P. §§ 629,630. Appellants maintain that no writ of execution could issue under Texas law because the Order to be enforced did not include the names of the relevant parties or state the amount of money to be paid.

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[4]The time-limit for enforcement began to run when the Supreme Court denied review of the judgment. *See John F. Grant Lumber Co. v. Bell,* 302 S.W.2d 714 (Tex.Civ.App.-Eastland 1957). Therefore, the judgment became dormant on February 23, 1997, ten years after the Supreme Court denied *certiorari.* The judgment became forever barred on February 23, 1999, after appellants failed to revive the judgment within two years. Appellants brought this suit on July 9, 2004.

Appellants' argument is misplaced. For one, even if one assumes that the judgment was too vague for a writ of execution under Texas law, appellants still should have brought an enforcement action in the district court before the time limitation was up. Inability to comply with one aspect of Texas law does not excuse them from the law in its entirety. *See Collins v. Hines*, 99 S.W. 400 (Tex. 1907) (holding that failure to comply absolutely with the requirements does not necessarily destroy the validity of a writ of execution); *Teston v. Brannin,* 261 S.W. 788 (Tex.Civ.App.-El Paso 1924) (holding that substantial compliance with the requirements of a writ of execution is sufficient); *see also Thomas, Head & Greisen Employees Trust v. Buster,* 95 F.3d 1449, 1452 (9th Cir. 1996) (allowing flexibility of state law technical procedures for enforcing judgment); *Resolution Trust Corp. v. Ruggiero,* 994 F.2d 1221,1226 (7th Cir. 1993) (explaining that Rule 69(a) was not intended to require application of "every jot and title" of state law). Moreover, appellants misread the requirements for a writ of execution under Texas law. According to the plain language of the Texas Rules of Civil Procedure, the *execution* itself -- not the underlying judgment – must contain the names of the parties and the sum to be paid. *See* TEX.R.CIV.P. §§ 629,630. Appellants simply had to include the requisite names and amounts in their writ in order to enforce the judgment, which they did in their present suit. Failure of compliance is not an excuse for

waiting to execute the judgment.[5]

Finally, even if Texas law required that the judgment itself list the names of the parties and the amount to be paid, the district court's Order was sufficient for issuing a writ of execution. The Order provides:

> [I]n accordance with the provisions of Section VI of the Decree, Defendant Roadway Express, Inc., shall pay to the individuals listed in Exhibit "I" of the Joint Motion for Approval of Individual Calculations of Back-Pay Settlement Amounts filed by Defendant Roadway Express, Inc., and Counsel for the Plaintiffs' Class . . . the sums set forth therein which were approved by Order of this Court dated June 28, 1985.

The judgment's language unambiguously identifies the

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[5]In their brief on appeal, appellants point to a personal conversation with the Supervisor of the Post Judgment Department of the Harris County District Clerk's Office for the proposition that her office could not issue a writ of execution on the Judgment because it did not state in the body the names of the parties in whose favor and against whom the judgment was rendered, or the amount rendered. In referencing this non-record evidence, appellants misapprehend that the Harris County District Clerk's office in Houston, Texas, has nothing to do with issuing a writ of execution for a federal court judgment. The writ is issued by the federal court who then applies Texas law, none of which depends on the abilities of state court administrative offices.

judgment debtor as "Defendant Roadway Express." *See* 34 TEX.JUR. *Enforcement of Judgments* § 58 (2005) ("The defendant in execution must be so identified as to enable the officer to levy on the property of the judgment debtor and no other."). The parties to be paid are identified by the Order's incorporation of "Exhibit 1 of the Joint Motion for Approval of Individual Calculation of Back-Pay Settlement Amounts filed by Defendant Roadway Express." A list of plaintiffs, by reference, is more than sufficient to file a writ of execution under Texas law. *See Bryan v. Bryan*, 262 S.W.2d 736,743 (Tex.Civ.App.-Texarkana 1953) (rendering the exact identity of the plaintiff as unnecessary); *Patton v. Crisp & White,* 11 S.W.2d 826, 828 (Tex.Civ.App.-San Antonio 1928 ("The recitation as to the parties plaintiff was sufficient to identify the judgment rendered with that referred to in the execution, which was the purpose contemplated in the requirement of the statute."). The amounts to be paid are specified as "the sums set forth" in Exhibit "1." As with the list of plaintiffs, Exhibit 1 was incorporated into the judgment and is sufficient under Texas law to satisfy a writ of execution.

Altogether, it is clear that the 1985 Order was sufficient to support issuance of a writ of execution. Appellants' failure to comply with Texas's time-limits is not legally excusable.

IV

Because we hold that Texas procedures govern enforcement of appellants' judgment and that, under Texas law, the action is dormant and forever time-barred, we AFFIRM.

APPENDIX
(DISTRICT COURT OPINIONS)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDDIE L. ANDREWS, ARTHUR MORRIS JOHNSON, HERBERT C. PERKINS, and JAMES E. PHIPPS, SR.,	*	
Plaintiffs,	*	**CIVIL ACTION NO. SA-04-CA-606-JWP**
v.	*	
ROADWAY EXPRESS, INC.,	*	
Defendant.	*	

ORDER

Before the Court is Defendant's motion for summary

judgment. (Docket nos. 13,14). Plaintiffs have responded.[1] Upon consideration, the Court concludes Defendant's motion shall be **GRANTED.**

Factual Background

Plaintiffs bring this action to recover under a 1985 agreed judgment rendered in the San Antonio Division of the Western District of Texas. As both named and unnamed members of a class, Plaintiffs contend they are entitled to receive benefits under a consent decree signed on April 12, 1985 in a class action *Salinas, et al v. Roadway Express, Inc., et al.*, Civil Action No. SA-71-CA-254. Final judgment in the *Salinas* action was entered on November 12, 1985. Several plaintiffs in this action appealed the final judgment on the

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[1]This Court notes Plaintiffs' response to Defendant's motion for summary judgment is untimely, as the motion for extension of time to file the response was filed 20 days after the response was due. In any event, this Court has allowed the response. Also, the Court has become aware that the license of Plaintiffs' counsel, Carnegie Mims, Jr., to practice in the Western District of Texas is no longer active. Given the Court's disposition of the Defendant's motion for summary judgment, the Court will overlook this fact for all pleadings, motions, and documents Mr. Mims has filed in this action in Plaintiffs' behalf to this date. However, Mr. Mims and Plaintiffs are hereby admonished that if Plaintiffs wish to file any further pleadings in this action, Mr. Mims must, first, renew his license to practice in the Western District of Texas, or Plaintiffs must find another attorney licensed to do so. Any further pleadings filed by Mr. Mims in this action while he remains unlicensed will be stricken by the Court.

consent decree, contending the money damages to be awarded were insufficient. The trial court's final judgment was affirmed, and Plaintiffs' objections overruled on appeal on October 17, 1986. The United States Supreme Court denied writ of certiorari on February 23, 1987. Plaintiffs filed this action against Roadway Express, Inc. to enforce the judgment on the consent decree entered in the *Salinas* case. Roadway Express now moves for summary judgment on this action.

Summary Judgment

Federal Rule of Civil Procedure 56(b) provides that a defending party may move, with or without supporting evidence, for a summary judgment in the party's favor. Summary judgment shall be rendered if the pleadings and evidence show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. **FED. R. CIV. P. 56(c).** A party seeking summary judgment bears the initial burden of informing the court of the basis of its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of a material fact. **Celotex Corp. v. Catrett,** 477 U.S. 317, 323 (1986). The party opposing a motion must present affirmative evidence to defeat a properly supported motion for summary judgment. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 257 (1986). A defendant who moves for summary judgment on the plaintiff's claim may satisfy its burden in two ways: (1) submit evidence that negates the existence of a material element of the plaintiff's claim; or (2) show there is not evidence to support an essential element of the plaintiff's claim. **Celotex Corp.**, 477 U.S. at 325. An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing there is a genuine issue for trial; if he

does not so respond, summary judgment, if appropriate, shall be entered against him. **FED. R. CIV. P. 56(e).**

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. **Anderson,** 477 U.S. at 247-248. The dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. **Id.** All of the evidence and inferences drawn from that evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment. **Hibernia Nat'l Bank v. Carner**, 997 F.2d 94, 97 (5th Cir. 1993).

Discussion

Citing Texas law, Roadway Express contends the underlying final judgment from which Plaintiffs seek to recover is dormant, the statute of limitations to revive the dormant judgment has run, and, therefore, this action is time-barred. Plaintiffs respond that the Texas statutes upon which Roadway Express relies do not apply to agreed judgments. Further, Plaintiffs argue that because this Federal Court retains jurisdiction to enforce the provisions of the agreed judgment, any application of Texas law is inappropriate. Finally, Plaintiffs argue the Texas statutes cannot be applied in this situation because the final agreed judgment was not sufficiently certain to facilitate enforcement or execution because the specific amounts due to identified class members was not included therein. This Court finds Plaintiffs arguments to be without merit.

The "process to enforce a judgment for the payment of

money shall be a writ of execution." **FED.R.CIV.P. 69(a).** Under Rule 69(a), the procedure for the execution of a judgment rendered by a federal court is controlled by the law of the state in which the federal court sits, unless a specific federal statute applies by its own terms. **Id.** State law also establishes the limitations period for enforcing a judgment rendered by a federal court. **See Home Port Rental, Inc. v. Int'l Yachting Group, Inc.** 252 F.3d 399, 409 (5th Cir. 2001).

Because the federal court which rendered the underlying judgment in this case sits in Texas, and because the Court finds no specific federal statute which controls execution of a judgment on a consent decree, Texas law controls these matters in this action. Although Rule 69(a) does not expressly state it applies to a final agreed judgment, Plaintiffs cite no plausible reason why such judgments should not be controlled by Rule 69(a). An agreed judgment is still "a judgment for the payment of money". The only exceptions to the general rule that the procedure to enforce a money judgment is by writ of execution pursuant to the law of the state in which the federal court sits are a specific federal statute applies by its own terms, or the Court directs otherwise. Neither exception applies in the facts in this case. Accordingly, Rule 69(a) applies, and Texas law shall control "[t]he procedure on execution, in proceedings supplementary to and in aid of judgment, an in proceedings on and in aid of execution." **FED.R.CIV.P. 69(a).**

Under Texas law, money judgments shall be enforced by "execution or other appropriate process." **TEX.R.CIV.P. 621, 622.** If a writ of execution is not issued within 10 years after rendition of a judgment, the judgment becomes dormant, and "execution may not be issued . . . unless it is revived." **TEX.CIV.PRAC. & REM. CODE § 34.001**. In this statute, a writ of execution is issued when it is delivered to an officer

for enforcement. **Williams v. Short**, 730 S.W.2d 98, 99-100 (Tex.App.-Houston [14th Dist.] 1987, writ ref'd n.r.e.). Thus, to comply with these time constraints, the judgment creditor must either deliver a writ of execution to the appropriate officer for enforcement, or, if actual delivery is made after the 10-year period, the judgment creditor must show reasonable diligence to make delivery from the date shown on the writ to the date of delivery. **Id.** To revive a dormant judgment, the judgment creditor must file an action of debt or other appropriate motion within two years from the date the judgment became dormant. **TEX.CIV.PRAC. & REM. CODE §§ 31.006, 34.001(a); see also FED.R.CIV.P. 81(b).** If no action to revive a dormant judgment is filed within this limitations period, it becomes "void of lawful effect by operation of law" and any judgment creditor is forever barred from enforcement. **TEX.CIV.PRAC. & REM. CODE §§ 31.006; Hicks v. First Nat. Bank in Dalhart**, 778 S.W.2d 98, 104 (Tex.App.-Amarillo 1989, writ denied).

In this case, the summary judgment evidence shows the final, agreed judgment on the consent decree was rendered November 12, 1985. No writ of execution ever issued on the judgment from a Texas court. Therefore, the judgment became dormant on November 12, 1995. The summary judgment evidence shows no effort was made to revive this dormant judgment within two years from November 12, 1995. Thereby, the underlying judgment rendered on November 12, 1985 became forever barred from enforcement.

Evidence produced by Plaintiffs does not raise a genuine issue of material fact whether a writ of execution was timely issued on the final judgment or whether any effort was made to revive the final judgment. Plaintiffs summary judgment evidence, though incompetent because it is

unauthenticated, actually supports Roadway Express' position in this motion for summary judgment. Plaintiffs' evidence shows Roadway Express acknowledged all Plaintiffs in this action did not receive their settlement allotment in the underlying action. However, such omission was not the fault of Roadway Express, but the result of Plaintiffs' failure to execute the pertinent agreements called for by the consent decree. Further, if Roadway Express had been at fault for this omission, Plaintiffs should have filed an action to enforce the final judgment pursuant to Texas law. Plaintiffs failed to do so. Accordingly, the final judgment became dormant.

This Court finds Plaintiffs' remaining arguments to be without merit. Application of state law, pursuant to Federal Rule of Civil Procedure 69(a), is not a renunciation of this Court's jurisdiction to enforce the final agreed judgment. This Court recognizes it retained such jurisdiction; however, Plaintiffs failed to satisfy the required steps to enforce the underlying judgment. Thus, the judgment became dormant. Finally, this Court finds the final agreed judgment to be sufficiently certain to facilitate its execution.

For these reasons, the pleadings and evidence show there is no genuine issue as to any material fact, and Roadway Express is entitled to judgment as a matter of law. Plaintiffs produce no summary judgment evidence which would raise any genuine issue of material fact for trial. Therefore, summary judgment in favor of Roadway Express is appropriate. Accordingly, Roadway Express' motion for summary judgment is **GRANTED.**

It is so **ORDERED.**

SIGNED this 18th day of October 2005.

/s/

JOHN W. PRIMOMO
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDDIE L. ANDREWS, ARTHUR MORRIS JOHNSON, HERBERT C. PERKINS, and JAMES E. PHIPPS, SR.,	*	
Plaintiffs,	*	**CIVIL ACTION NO. SA-04-CA-606-JWP**
v.	*	
ROADWAY EXPRESS, INC.,	*	
Defendant.	*	

ORDER

Before the Court is plaintiffs' motion for new trial. (Docket no. 22). Defendant has not responded. Upon consideration, the Court concludes the motion shall be **DENIED.**

Factual Background

Plaintiffs brought this action to recover under a 1985 final judgment rendered in the San Antonio Division of the Western District of Texas. As both named and unnamed members of a class, plaintiffs contend they are entitled to

receive benefits under a consent decree signed on April 12, 1985 in a class action *Salinas, et al v. Roadway Express, Inc., et al.*, Civil Action No. SA-71-CA-254. Final judgment in the *Salinas* action was entered on November 12, 1985. Several plaintiffs in this action appealed the final judgment on the consent decree, contending the money damages to be awarded were insufficient. The trial court's final judgment was affirmed, and Plaintiffs' objections overruled on appeal on October 17, 1986. The United States Supreme Court denied writ of certiorari on February 23, 1987. On July 9, 2004, Plaintiffs filed this action against Roadway Express, Inc. to enforce the judgment on the consent decree entered in the *Salinas* case. Roadway Express moved for summary judgment on this present action, and this Court granted that motion. Plaintiffs now file this current motion for new trial.[1]

Standard of Review

A "motion to alter or amend the judgment under Rule

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[1]Plaintiffs do not indicate in their motion for new trial the basis for such motion, nor under which Federal Rule of Civil Procedure they seek such relief. Because this Court has entered summary judgment, plaintiffs filed their motion for new trial within 10 days of entry of this summary judgment, and plaintiffs appear to challenge this judgment on its merits, this court will construe the plaintiffs' motion for new trial as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). **See Lavespere v. Niagara Mach. & Tool Works, Inc.**, 910 F.2d 167, 173 (5th Cir. 1990) (citations omitted), *partially abrogated on other grounds,* **see Little v. Liquid Air Corp.**, 37 F.3d 1069, 1076 n.14 (5th Cir. 1994) (en banc)).

59(e) 'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued.'" **Rosenzweig v. Azurix Corp.**, 332 F.3d 854, 863-864 (5th Cir. 2003) (quoting **Simon v. United States**, 891 F.2d 1154, 1159 (5th Cir. 1990)).

Discussion

Plaintiffs assert this Court misconstrued their three arguments in response to Roadway Express' motion for summary judgment, and thereby, committed manifest error. This Court will address the three arguments in turn.

First, plaintiffs state that contrary to this Court's statement, they do not argue that Texas statutes do not apply to agreed judgments. Instead, plaintiffs assert they intended to argue Texas law does not apply to a final judgment approving a consent decree. Because agreed judgments differ from a judgment entered on a consent decree, plaintiffs assert this Court's mischaracterization of their argument resulted in incorrect analysis and conclusion.

Although this Court improperly characterized the final judgment in this case as an agreed judgment and recognizes that some differences exist between a final judgment entered on a consent decree and an agreed judgment, this mischaracterization does not affect the final result or conclusions drawn by the Court with regard to the substance of Roadway Express' motion for summary judgment. Both types of judgments, whether entered on a consent decree or an individual plaintiff's settlement agreement, are final judgments. Under Federal Rule of Civil Procedure 69(a), the procedure for the execution of a final judgment for the payment of money

rendered by a federal court, regardless of the type, is controlled by the law of the state in which the federal court sits, unless a specific federal statute applies by its own terms, or the Court direct otherwise. **FED.R.CIV.P. 69(a).** Plaintiffs do not indicate a specifi federal statute applies by its own terms when a final judgment is rendered on a consent decree. Further, plaintiffs give no other reason why Texas law would not apply to a final judgment rendered on a consent decree, nor does this Court find any. Therefore, plaintiffs' first argument fails.

Next, plaintiffs argue the district court circumvented the general rule that the process to enforce the judgment should be by writ of execution pursuant to Texas law by directing otherwise in Section IX of the consent decree.

As correctly stated by plaintiffs, in the underlying class action, the district court retained jurisdiction to enforce the final judgment entered on the consent decree. **See In re Corrugated Container Antitrust Litigation,** 752 F.2d 137, 141 (5th. Cir. 1985); **see also Beeks v. Hundley,** 34 F.3d 658, 660 (8th Cir. 1994); **Halderman v. Pennhurst State Sch. and Hosp.,** 901 F.2d 311, 317-318 (3d Cir. 1990). Should the need arise, the "process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise." **FED.R.CIV.P. 69(a).** Under Rule 69(a), the procedure for the execution of a judgment rendered by a federal court is controlled by the law of the state in which the federal court sits, unless a specific federal statute applies by its own terms. **Id.** State law also establishes the limitations period for enforcing a judgment rendered by a federal court. **See Home Port Rentals, Inc. v. Int'l Yachting Group, Inc.** 252 F.3d 399, 409 (5th Cir. 2001).

Section IX of the parties' consent decree states:

> There being no just reason for delay, the entry of this Decree finally adjudicated all of the claims, rights and liabilities of all the parties and members of the plaintiffs' class and terminates this action with prejudice except the Court shall retain jurisdiction of this matter for the sole, express and limited purposes of: (1) enforcing and/or interpreting the terms of this Decree as previously set forth in Section VI hereof. . . .

This provision only reiterates established precedent that the court retained jurisdiction to enforce the final judgment. The fact that the District Court retained this specific jurisdiction did not obviate any applicable statute of limitations to enforce the final judgment. This Court does not find the District Court directed that another procedure would control the process to enforce the judgment on the consent decree. Also, review of the consent decree reveals no other provision which so directs. Therefore, as stated in Section IX of the consent decree and as directed under common law, the district court retained jurisdiction to enforce the final judgment entered on the consent decree. Even though the district court retained jurisdiction to enforce the final judgment entered on the consent decree, as directed by Federal Rule of Civil Procedure 69(a), Texas law controlled the procedure to be utilized for the execution of such judgment and the applicable statute of limitations.

As stated in this Court's order on Roadway Express' motion for summary judgment, under Texas law, if a writ of execution is not issued within 10 years after rendition of a judgment, the judgment becomes dormant, and "execution may not be issued . . . unless it is revived." **TEX.CIV.PRAC. &**

REM. CODE § 34.001. A writ of execution is issued when it is delivered to an officer for enforcement. **Williams v. Short**, 730 S.W.2d 98, 99-100 (Tex.App.-Houston [14th Dist.] 1987, writ ref'd n.r.e.). Thus, to comply with these time constraints, the judgment creditor must either deliver a writ of execution to the appropriate officer for enforcement, or, if actual delivery is made after the 10-year period, the judgment creditor must show reasonable diligence to make delivery from the date shown on the writ to the date of delivery. **Id.** To revive a dormant judgment, the judgment creditor must file an action of debt or other appropriate motion within two years from the date the judgment became dormant. **TEX.CIV.PRAC. & REM. CODE §§ 31.006, 34.001(a); see also FED.R.CIV.P. 81(b).** If no action to revive a dormant judgment is filed within this limitations period, it becomes "void of lawful effect by operation of law" and any judgment creditor is forever barred from enforcement. **TEX.CIV.PRAC. & REM. CODE §§ 31.006; Hicks v. First Nat. Bank in Dalhart**, 778 S.W.2d 98, 104 (Tex.App.-Amarillo 1989, writ denied).

In this case, the summary judgment evidence showed the final judgment on the consent decree was rendered November 12, 1985. No writ of execution ever issued on the judgment. Therefore, the judgment became dormant on November 12, 1995. The summary judgment evidence shows no effort was made to revive this dormant judgment within two years from November 12, 1995. Thereby, the underlying judgment rendered on November 12, 1985 became forever barred from enforcement.

Finally, plaintiffs argue that, under Texas law and rules of procedure, a writ of execution could not have been issued on the final judgment. Because the final judgment did not state the specific amount of money Roadway Express agreed to pay

and did not state the names of all the parties in whose favor and against whom the judgment was rendered, and because the final judgment required the parties to keep this information confidential, plaintiffs contend the clerk of court could not have prepared a writ of execution even if they had timely requested such.

Under Texas Rule of Civil Procedure 629, the writ of execution "shall describe the judgment, stating the court in which, and time when rendered, and the names of the parties in whose favor and against whom the judgment was rendered." **Tx.R.Civ.P. 629.** Rule 630 requires the writ to "specify in the body thereof the sum recovered or directed to be paid and the sum actually due when it is issued." **Tx.R.Civ.P. 630.**

After review of this applicable Texas law and the final judgment rendered in the underlying action, this Court finds plaintiffs' argument to be without merit. The fact that the final judgment did not state the specific amount of money Roadway Express agreed to pay and did not specifically state the names of all the parties in whose favor and against whom the judgment was rendered, did not render issuance of a writ of execution impossible. The judgment did state this specific information was contained in "Exhibit 1 of the Joint Motion for Approval of Individual Calculation of Back-Pay Settlement Amounts" approved by the Court on June 28, 1985. **See plaintiff's motion for new trial, Exh. A, Order filed 11/12/85, p. 3.** Although this document was placed under seal in accordance with the parties' confidentiality agreement, the final judgment stated the information could be obtained through notice and by order of the Court. **Id.** at p. 4. Therefore, had the parties timely pursued issuance of a writ of execution on the final judgment, they could have obtained the information required to be stated within the writ of execution.

Neither of Rules 629 or 630 require that the final judgment upon which the writ of execution is issued contain the specific information therein. These rules require only that the writ of execution contain this information. Therefore, a writ of execution could have issued on the final judgment under Texas law and rules of procedure, and the fact that such specific information was not contained within the final judgment did not preclude the plaintiffs from obtaining this information or the clerk of court from issuing the writ of execution.

Because plaintiffs have not shown this Court committed manifest error in its order granting Roadway Express' motion for summary judgment, their motion to alter or amend this judgment is **DENIED.**

It is so **ORDERED.**

SIGNED this /s/ 22nd day of November 2005.

/s/

JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX
(STATUTES INVOLVED)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

A. FEDERAL RULE OF CIVIL PROCEDURE:

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

B. TEXAS CIVIL PRACTICES & REMEDIES CODE:

Sec. 34.001. No Execution on Dormant Judgment

(a) If a writ of execution is not issued within ten years after the rendition of the judgment of a court of record or a justice court, the judgment is dormant and execution may not be issued on the judgment unless it is revived.

Sec. 31.006. Revival of Judgment

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant.

C. TEXAS RULES OF CIVIL PROCEDURE:

Rule 622. Execution

An execution is a process of the court from which it is issued. The clerk of the district or county court, or the justice of the peace, as the case may be, shall tax the costs in every case in which a final judgment has been rendered, and shall issue execution to enforce such judgment and collect such costs. The execution and subsequent executions shall not be addressed to a particular county, but shall be addressed to any sheriff or any constable within the State of Texas.

Rule 629. Requisites of Execution

The style of the execution shall be "The State of Texas". It shall be directed to any sheriff or constable within the state of Texas. It shall be signed by the clerk or justice officially, and bear the seal of the court, if issued out of the district or county court, and shall require the officer to execute it, according to its terms, and to make the costs which have been adjudged against the defendant in execution and the further costs of

executing the writ. It shall describe the judgment, stating the court in which, and the time when, rendered, and the names of the parties in whose favor and against whom the judgment was rendered.

Rule 630. Execution on Judgment for Money

When an execution is issued upon a judgment for a sum of money, or directing the payment simply of a sum of money, it must specify in the body thereof the sum recovered or directed to be paid and the sum actually due when it is issued, and the rate of interest upon the sum due. It must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution.